89-755

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

WILLIAM HARNESS,

Petitioner,

vs.

HARTZ MOUNTAIN CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did this Court's opinion in *California Federal Savings and Loan Association v. Guerra,* 479 U.S. 272, 107 S.Ct. 683 (1987) interpret the Pregnancy Discrimination Act, 42 Unites States Code section 2000e(k), to permit favorable treatment for pregnant workers beyond that necessary to protect them from discrimination because of the physically or medically disabling aspects of pregnancy?

PARTIES TO THIS PROCEEDING

The Petitioner is William Harness, also known as Billy Lee Harness.

The Respondent is Hartz Mountain Corporation.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Parties to This Proceeding ii

Table of Contents iii

Table of Authorities iv

Reports of Opinions Below 1

Grounds upon which the Jurisdiction of this Court is Invoked 2

Statutory Provisions Involved in this Case 2

Statement of the Case 5

Argument 10

Conclusion 13

Appendix 1a

Opinion of the United States District Court of Western Kentucky, entered June 20, 1988 ..... 1a

Order of the United States District Court for Western Kentucky, entered June 20, 1988 ..... 8a

Opinion of the United States Court of Appeals for the Sixth Circuit, decided and filed June 27, 1989 ..... 10a

Order of the United States Court of Appeals for the Sixth Circuit, filed August 10, 1989 ..... 26a

TABLE OF AUTHORITIES

Page

CASES

California Federal Savings and Loan Association v. Guerra, 479 U.S. 272, 107 S.Ct. 683 (1987) 8, 10, 11, 12, 13

EEOC v. Group Hospital Services, Inc., 539 F.Supp. 185 (N.D. Tex, 1982) 8

Kansas Gas and Electric Co. v. KCCR, 46 FEP Cases 149 (Kansas, 1988) 8

STATUTES

42 United States Code Section 2000e-2(a)(1) 2

42 United States Code Section 2000e-2(a)(2) 2

42 United States Code Section 2000e(k) 3, 10, 11

Kentucky Revised Statutes section 344.020(1)(a) 3

Kentucky Revised Statutes section 344.040(1) 4

Kentucky Revised Statutes section 344.040(2) 4

Kentucky Revised Statutes section 344.030(6) 4, 11

Kentucky Revised Statutes section 344.450 5

RULES

Rules of the Supreme Court, 17.1(c) 14

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PETITION FOR WRIT OF CERTIORARI

REPORTS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in this case was published at 877 F.2d 1307. The opinion of the District Court was not published in any official or unofficial reporter known to the Petitioner.

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the decree (opinion) sought to be reviewed is June 27, 1989. The date of the Court of Appeals Order respecting a rehearing was entered on August 10, 1989.

The Petitioner believes that this Court has jurisdiction to review the opinion of the Court of Appeals by writ of certiorari under and by virtue of the provisions of 28 United States Code Section 1257(3).

STATUTORY PROVISIONS INVOLVED IN THIS CASE

42 United States Code Section 2000e-2(a)(1)

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin.

42 United States Code Section 2000e-2(a)(2)

It shall be an unlawful employment practice for an employer to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 United States Code Section 2000-e(k)

The terms, "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title [42 United States Code Section 2000e-2(h)] shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided,* that nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

Kentucky Revised Statutes 344.020(1)(a)

The general purposes of this chapter are: (a) To provide for execution within the state of the policies embodied in the federal Civil Rights Act of 1964 as amended (78 Stat. 241), Title VIII of the federal Civil Rights Act of 1968 (82 Stat. 81) and the federal Age Discrimination in Employment Act of 1967 (81 Stat. 602).

Kentucky Revised Statutes 344.040(1)

It is an unlawful practice for an employer to fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, national origin, sex, or age between forty (40) and seventy (70).

Kentucky Revised Statutes 344.040(2)

It is an unlawful practice for an employer to limit, segregate, or classify his employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, national origin, sex, or age between forty (40) and seventy (70).

Kentucky Revised Statutes 344.030(6)

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in this section shall be interpreted to permit otherwise.

Kentucky Revised Statutes 344.450

Any person deeming himself injured by any act in violation of the provisions of this chapter shall have a civil cause of action in circuit court to enjoin further violations, and to recover the actual damages sustained by him, together with the cost of the law suit, including a reasonable fee for his attorney of record, all of which shall be in addition to any other remedies contained in this chapter.

STATEMENT OF THE CASE

The Petitioner in this case, Plaintiff-Appellant below, is Bill Harness. Harness began working for Household Research Institute as a salesman during July, 1972 (Opinion of Court of Appeals, P. 2; This Brief, P. 11a). The Respondent, Hartz Mountain Corporation, purchased Household Research Institute early in 1986, and on March 1, 1986, Harness officially became an employee of Hartz Mountain (Joint Appendix for the Court of Appeals, hereinafter JA, P. 4, #1). As such, he was entitled to certain employee benefits, one of which was a policy that provided for unpaid leaves of absence during periods of illness or disability (JA, P. 4, #2).

On June 6, 1986, Harness notified Hartz Mountain that he had suffered a heart attack and would require a leave of absence from his job. The company put Harness on unpaid leave because of his illness on June 9, 1986 (JA, P. 4, #3, #4).

The Hartz Mountain policy that covered situations such as that in which Harness found himself was as follows:

> If your leave [of absence] is for illness or non-work related injury, you are eligible for a thirty (30) day leave. If you are unable to return after the first 30-day leave, you may request an extension in writing, with a doctor's note attached indicating your return to work date. If you are unable to return after 60 days (original leave plus 30-day extension), you may request another 30-day extension, in writing, with another doctor's note attached, indicating your return to work date. If you cannot return to work after the aforementioned 90 days, you will be considered to have resigned your position because of illness (JA, P. 5, #9; This Brief, P. 11a).

Shortly after Harness' medical leave began, the company sent him a copy of its leave policy, which he signed and returned to Hartz Mountain on June 23, 1986 (JA, P. 6, #2).

Harness' 90 day unpaid leave expired on September 9, 1986 (JA, P. 6, #14). As of that date Harness was still unavailable to return to work because he had not completely recovered from his heart attack (JA, P. 7, #17).

On October 17, 1986, Harness obtained a statement from his treating physician stating that he was released to return to work as of October 14, 1986 (JA, P. 6, #16). Of course, by that time more than 90 days had passed since Harness' unpaid leave had begun; 125 days to be exact. The company would not permit Harness to return to his position of employment with it because of its 90-day limit on unpaid leaves of absence for ordinary illness or injury (JA, P. 7, #18).

Harness did not believe that the company's position was fair because of the following provision in its unpaid leave policy:

> If your leave is for maternity related reasons, you are entitled to a 90-day leave to be used before and after the date of the delivery. This type of leave may be extended up to one (1) year, provided a written request is made each sixty (60) days (JA, P. 5, #10; P. 11; This Brief, P. 12a).

On August 7, 1987, Harness filed suit against Hartz Mountain in Jefferson Circuit Court of the Commonwealth of Kentucky (JA, P. 7, #20). His Complaint, filed pursuant to Kentucky Revised Statutes, 344.450, alleged that Hartz Mountain discharged him on September 9, 1986:

> . . . pursuant to a policy that discriminated against males in favor of pregnant females, and was therefore undertaken because of the Plaintiff's male sex in violation of KRS 344.040(1) as interpreted by KRS 344.030(6) (Record of the District Court, #1, Complaint, par. 6,7)

On August 28, 1987, the company removed Harness' lawsuit to the United States District Court for Western Kentucky upon the basis of diversity of citizenship (*Id.*, Removal Petition, P. 2).

The parties agreed to submit Harness' claim to the District Court upon stipulated facts (JA, Pp. 4-7), which have formed the basis of this statement of the substantive facts of this case.

Shortly after the stipulations were submitted to the Court, the parties filed cross-motions for summary judgment. After the briefing was accomplished, the District

Court on June 20, 1988, granted the Defendant Hartz Mountain's motion for summary judgment and entered an Order dismissing the Plaintiff's claim (JA, P. 35; This Brief, Pp. 8a-9a).

The District Court essentially based its opinion in support of its Judgment for Hartz Mountain on the argument that the company's regular (90-day) unpaid leave policy for illness and injury treated males and females alike, and that the company's maternity leave policy was permissible under a Kansas appellate opinion published only in an unofficial reporter, *Kansas Gas and Electric Co. v. KCCR*, 46 FEP Cases 149 (Kansas, 1988) and an opinion from a United States District Court in Texas, *EEOC v. Group Hospital Services, Inc.*, 539 F. Supp. 185 (N.D. Tex., 1982) [JA Pp. 30-35; This Brief, Pp. 1a-7a]. This despite the fact that the parties had both basically relied upon this Court's opinion in the case of *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 107 S.Ct. 683 (1987) [Record of the District Court, #13, Defendant's Motion for Summary Judgment; #14, Response to Motion for Summary Judgment and Plaintiff's Own Motion for Summary Judgment].

Bill Harness appealed the District Court's adverse decision to the United States Court of Appeals for the Sixth Circuit.

The parties essentially repeated the arguments that they had made to the District Court to the Court of Appeals.

The parties and both of the lower Courts agreed that it was proper to, " . . . turn to the federal court decisions interpreting the PDA [42 United States Code section

2000e-(k)] to decide the case," for the reasons set forth by the Court of Appeals at pages 4-5 of its opinion (This Brief, Pp. 14a-15a), except that the Petitioner does not agree with the principle of law stated by the Court in its footnote to page 5 of its opinion (This Brief, P. 14a).

The Court of Appeals candidly and correctly stated in its opinion in this case that, " . . . the pregnancy leave policy of Hartz [Mountain] gives preferential treatment to pregnant employees," and just as correctly stated the precise nature of the preferential treatment set forth in the policy (Opinion of the Court of Appeals, P. 6; This Brief, Pp. 15a-16a). It approved the Company's policy of giving pregnant females up to one year of unpaid leave while other disabled employees could receive only 90 days of such leave upon the sole basis of this Court's *Guerra* opinion, previously cited (*Id.*)

Of course one member of the three-judge panel that decided this case, Hon. David Nelson, dissented. For all its eloquence and persuasiveness, however, Judge Nelson's dissent need not concern us because it essentially agreed with the panel majority's interpretation of the meaning of this Court's *Guerra* opinion (Opinion of the Court of Appeals, Judge Nelson dissenting, Pp. 9-14; This Brief, Pp. 16a-25a).

It is this interpretation that the Petitioner is attacking.

On June 27, 1989, the Court of Appeals handed down its opinion in this case, which has been published at 877 F.2d 1307 (6th Cir., 1989).

Harness timely petitioned the Court of Appeals for rehearing or rehearing *en banc*. On August 10, 1989, the Court denied both petitions (This Brief, P. 26a). Harness now seeks a writ of certoriari from this Court.

ARGUMENT

I

BY APPROVING FAVORABLE TREATMENT OF PREGNANT WOMEN BEYOND THE PREFERENCE NECESSARY TO PROTECT THEM FROM DISCRIMINATION BECAUSE OF THE MEDICALLY OR PHYSICALLY DISABLING ASPECTS OF PREGNANCY, THE COURT OF APPEALS' OPINION IN THIS CASE IS IN CONFLICT WITH THIS COURT'S INTERPRETATION OF THE PREGNANCY DISCRIMINATION ACT AS SET FORTH IN THE CASE OF *CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION V. GUERRA*, 479 U.S. 272, 107 S.Ct. 683 (1987).

The Petitioner believes that the opinion of the Court of Appeals in this case is in direct conflict with this Court's interpretation of the Pregnancy Discrimination Act, 42 United States Code section 2000e(k), as set out in the opinion of *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 107 S.Ct. 683 (1987).

The Petitioner does not believe that this Court simply gave blanket approval to *any* preferential treatment of pregnancy in *Guerra*. Its opinion noted instead that preferential treatment of pregnancy must be, " . . . subject to certain limitations," such as not being, " . . . based on stereotypes or generalizations about the . . . needs and abilities [of pregnant employees]," *Guerra*, 107 S.Ct. at

691, including note 17. The Court emphasized in *Guerra* that the California statute at issue in that case:

> . . . is narrowly drawn to cover only the period of *actual physical disability* on account of pregnancy, childbirth, or related medical conditions [emphasis original], *Id.*, 107 S.Ct. at 694.

The Court further intimated in *Guerra* that a disability leave policy granting preference to pregnant women on *any basis* other than the actual physically or medically disabling aspects of pregnancy would run afoul of Title VII's general prohibition against sex discrimination because it would be " . . . inconsistent with Title VII's goal of equal opportunity," *Id.* 107 S.Ct. at 694. The Court indicated that this was so because any pregnancy leave policy based on non-medical or non-physical factors would reflect, " . . . archaic or stereotypical notions about pregnancy and the abilities of pregnant workers," *Id.*

The Court's opinion on these issues as set forth in *Guerra* is hardly surprising in light of the fact that the Pregnancy Discrimination Act, 42 United States Code Section 2000e(k), and its Kentucky counterpart, Kentucky Revised Statutes 344.030(6), appear to define pregnancy as a physically or medically disabling condition and in no other manner.

The pregnancy leave policy of the Respondent, Hartz Mountain Corporation, is *not* narrowly drawn to cover only the period of actual physical disability caused by pregnancy, childbirth, or related medical conditions as was the California statute at issue in *Guerra*, 107 S.Ct. at 694. Indeed, Hartz Mountain's pregnancy leave policy (This Brief, *supra*, P. 7; *infra*, P. 12a) requires *no* doctors'

notes or proof of physical or medical disability whatsoever during the entire course of the one year it grants to its beneficiaries. As Petitioner pointed out to the Court of Appeals, " . . . the Defendant's one year leave policy for pregnant females makes no pretense of having any connection to the physical disabilities brought about by pregnancy," (Appellant's Brief for the Court of Appeals, P. 7). Furthermore, Respondent's pregnancy leave policy obviously far exceeds any minimal amount of time physically or medically necessary to bear a child and recover sufficiently to return to work, absent complications.

This is in sharp contrast to the Respondent's leave policy for non-pregnancy related disabilities, which in addition to permitting only one-fourth of the amount of time as the pregnancy leave policy of the company also requires a doctor's note at least every 30 days! (This Brief, *supra*, P. 6; *infra*, P. 11a).

The Petitioner believes and has consistently argued that the Respondent's pregnancy leave policy is little more than a reflection of the sort of, " . . . stereotypes or generalizations about the needs [of pregnant workers]," that the plurality of this Court condemned in the *Guerra* opinion, 107 S.Ct. at 691, note 17.

Petitioner further believes that Respondent's pregnancy leave policy, when compared to its general medical leave policy, *does not* achieve any goal of Title VII or its Kentucky counterpart, Kentucky Revised Statues section 344. It therefore violates the rule implicit in the *Guerra* plurality opinion that concurring Justice Stevens stated as follows:

> . . . preferential treatment of the disadvantaged class is only permissible so long as it is consistent with accomplishing the goals that Congress designed Title VII to achieve, *Guerra, supra,* 107 S.Ct. at 697, citing *Steelworkers v. Weber,* 443 U.S. 193, 204, 99 S.Ct. 2721, 2727.

The Court of Appeals' approval of Respondent's pregnancy leave policy under the circumstances of this case is essentially a declaration that the PDA and its Kentucky counterpart permit *any* preferential treatment of pregnancy in disability leave policies. It completely ignores Justice Stevens' obviously correct observation that one could, " . . . not read the Court's [*Guerra*] opinion as holding that Title VII presents no limitations whatsoever on beneficial treatment of pregnancy," *Guerra, supra,* 107 S.Ct. at 696, note 3. It condones, in the name of *Guerra,* obviously illegal sex discrimination.

CONCLUSION

It appears to the Plaintiff that the opinion of the Court of Appeals in this case, although it arose under a state statute, will be justifiably cited by the Courts of this nation and Title VII practitioners for the proposition that under *Guerra,* the PDA in no manner restricts preferential treatment of pregnant employees in the workplace. This is so, of course, because of the identity between the PDA and the relevant portion of the Kentucky Civil Rights Act and because the Court below correctly held that federal case law should be used to interpret the Kentucky Civil Rights Act.

Unfortunately, the Court of Appeals seriously misapprehended the meaning of the *Guerra* opinion and the opinion of the Court of Appeals obviously conflicts with *Guerra*. Rule 17.1(c) of this Court indicates that this is a situation in which the granting of a petition for a writ of certoriari would be appropriate.

Respectfully Submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

BILL HARNESS
Plaintiff

v.

NO. C 87-0530-L(B)

THE HARTZ MOUNTAIN CORPORATION
Defendant

MEMORANDUM

This matter is before the Court on cross-motions of the plaintiff, Bill Harness, a/k/a Billie Lee Harness, and the defendant, The Hartz Mountain Corporation, for entry of summary judgment in this action brought under the Kentucky Civil Rights Statute, KRS 344.040(1) and KRS 344.030(6).[1]

This action, alleging a general discrimination against males based on sex, was filed originally in Jefferson Circuit Court and removed to this Court on October 1, 1987. Several facts are stipulated to this Court. The plaintiff started his employment as a Service Merchandiser on March 1, 1986. On June 9, 1986, he obtained a medical leave of absence as a result of having to undergo heart surgery. The defendant's written policy on medical leaves provides for a maximum 90 day leave (30 days, plus two

---

[1] The purpose of the statute is to "provide for execution within the state of the policies embodied in the federal Civil Rights Act of 1964, as amended," Title VIII of the federal Civil Rights Act of 1948 and the federal Age Discrimination in Employment Act of 1967.

30-day extensions) for employees, with an exception for pregnancy related conditions, which may result in a one year leave of absence. After the 90-day period is over, the employee is considered to have resigned his position with the defendant. Shortly after his leave began, the plaintiff was sent a copy of the defendant's leave of absence policy and signed the following:

> I have received your letter regarding the Company Leave of Absence procedures and agree to abide by them. I understand that failure to follow these procedures will result in my voluntary resignation.

The plaintiff was granted the maximum two extensions to his medical leave. On September 9, 1986, the date his leave expired, he still had not returned to work. On that date the defendant, consistent with its policy, considered him to have resigned. A statement by the plaintiff's treating physician was signed on October 17, 1986, and sent to the defendant advising that the plaintiff could return to work as of October 14, 1986, with no restrictions. This was approximately 35 days after his latest extension had expired.

The plaintiff maintains that the defendant's leave policy unlawfully discriminates against males in violation of the Kentucky Civil Rights Statute:

> KRS 344.040 – It is unlawful practice for an employer:
>
> (1) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, national origin, sex, or age between forty (40) and seventy (70). . . .

KRS 344.030 provides that the terms, "because of sex," or "on the basis of sex,"

> include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related purposes, including receipt of benefits under fringe benefit programs, and nothing in this section shall be interpreted to permit otherwise.

Both parties cite as controlling authority *California Federal Savings and Loan Association v. Guerra*, ___ U.S. ___, 107 S.Ct. 683 (1987). Therein California had a statute which mandated that employers subject to Title VII of the Civil Rights Act of 1964 provide female employees an unpaid pregnancy disabilty leave of up to four months. The statute was interpreted to provide pregnant employees a qualified right to reinstatement, subject to the possibility that the position would no longer be available as the result of business necessity. The issue was whether the statute conflicted with the Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. § 2000e(k), which prohibits sex discrimination based on pregnancy. The Supreme Court held that Title VII was not intended to preempt state law and that the PDA was to be "a floor beneath which pregnancy disability benefits may not drop – not a ceiling above which they may not rise." 107 S.Ct. at 692. Referring to other states with similar statutes, the Court acknowledged that Congress failed to evince the clear and manifest purpose to supersede those laws giving preferential treatment to pregnant workers. "To the contrary, both the House and Senate Reports suggest that these laws would continue to have effect under the PDA." 107 S.Ct. at 693.

The plaintiff interprets *Guerra, supra,* as requiring that once an employer provides a "floor" that prevents discharge on account of pregnancy, he also has a duty "not to discriminate in favor of pregnancy as much as not to discriminate against it." Justice Stevens concurred that the PDA does not demand complete neutrality or forbid all beneficial treatment of pregnancy. As stated in *Griggs v. Duke Power Co.,* 401 U.S. 424, 429-430, 91 S.Ct. 849, 852-853 (1971), the goal of Title VII is to "achieve equality of employment opportunities and to remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees." Since the Kentucky Civil Rights statute is an analogue of Title VII, their purposes are identical. KRS 344.020(1). Federal decisions applying federal civil rights laws may be used in applying similar state legislation. *Kentucky Commission on Human Rights v. Commonwealth of Kentucky Dept. of Human Resources,* Ky.App., 564 S.W.2d 38 (1978).

The plaintiff additionally refers to *Kansas Ass'n v. EEOC,* 33 FEP Cases 489 (Kan. 1983). There the court struck down a challenge to the following Equal Employment Opportunity Guideline, which was issued in question-and-answer form:

> Q. If an employer's insurance plan provides benefits after the insured's employment has ended (i.e. extended benefits) for costs connected with pregnancy and delivery where conception occurred while the insured was working for the employer, but not for the costs of any other medical condition which began prior to termination of employment, may an employer (1) continue to pay these extended benefits for pregnancy-related medical conditions but not

> for other medical conditions, or (b) terminate these benefits for pregnancy-related conditions.
>
> A. Where a health insurance plan currently provides extended benefits for other medical conditions on a less favorable basis than for pregnancy-related medical conditions, extended benefits must be provided for other medical conditons on the same basis as for pregnancy-related medical conditions. Therefore, an employer can neither continue to provide less benefits for other medical conditions nor reduce benefits currently paid for pregnancy-related medical conditions.

That situation pertains to an employee who has ceased employment, altogether, contrary to the facts in this case. Moreover, the guideline referred only to health insurance benefits, and not to maternity leave because of disability. *Kansas Gas & Electric Co. v. KCCR*, 46 FEP Cases 149 (Kan. 1988), is more analogous to the situation before the Court. There a male employee of Kansas Gas & Electric filed suit under Kansas's Civil Rights Laws, alleging sex discrimination by his employer's policy of permitting leaves of absence for pregnancy-related disabilities but not allowing leaves for male employees suffering medical disabilities. In holding that the challenged policy did not constitute sex discrimination, the Court stated:

> It is easy to mouth platitudes to the effect that employers should consider all employees as "its" and determine all employment policies on that basis. The extremists would declare that any deviation from this so-called ideal is unlawful. Such a position ignores the real world. Homo sapiens are either male or female. The role of bearing children falls on the female sex. As a result of our changing society, more than 50% of adult women of child-bearing age work

outside the home. For a variety of reasons, an ever-increasing number of households are headed by single women. Such households, economically, lag far behind their counterparts headed by single males or married couples. In recent years, considerable national attention has been focused on this problem and its causes and means of correction. One of the principal causes of the situation is the detrimental effect childbearing has on the career success of women. Let us assume three college graduates enter the market force at age 21 with comparable jobs with the same employer. Two are women and one is a man. All three progress up the company ladder for four years. The man decides to have a family. His wife bears children. This decision has no detrimental effect on his career and in fact may enhance it if the company favors "family" men in promotions. Woman A is a single career-oriented person and/or is infertile. She bears no children and progresses uneventfully up the company ladder. Woman B is a fertile woman with the natural desire to have a family. With no company policy protecting her, bearing a child makes her drop off the rung of the company ladder she has attained. When she rejoins the labor force, she starts at the bottom again. With the birth of a second child she again drops off the rung of the ladder she is climbing. Ten or fifteen years into our example the man and woman A in our example have a lead up the company ladder that woman B can never hope to catch. By now woman B may be divorced or widowed and the head of a three-person household. So, she now has substantial economic needs and lower income to meet such needs than do the man and woman A. Yet each of the three individuals was substantially equal in abilities and earning capacity at age 21.

46 FEP Cases, at 151. As in *Kansas Gas*, if a woman with a similar heart condition had been absent from work the number of days that the plaintiff was, she would likewise have been considered to have resigned.

The Kentucky statute, like the PDA, does not require employers to implement new policies or upgrade existing ones to bestow new benefits for men. These remedial statutes were enacted to put men and women on an equal footing. H.R. Rep. No. 95-948, 95th Cong., 2d Sess. (1978), reprinted in [1978] U.S. Code Cong. & Adm. News 4752. *Equal Employment Opportunity Commission v. Group Hospital Service, Inc.*, 539 F.Supp. 185 (N.D. Texas 1982).

The foregoing discussion convinces the Court that the motion of the plaintiff for entry of summary judgment should be denied, and that the motion of the defendant for summary judgment should be granted.

An appropriate order has been entered this 20th day of June, 1988.

/s/ Thomas A. Ballantine, Jr.
THOMAS A. BALLANTINE, JR.
United States District Judge

copies to counsel

ENTERED
JUN 20 1988

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

BILL HARNESS
Plaintiff

v.

NO. C 87-
0530-L(B)

THE HARTZ MOUNTAIN
CORPORATION
Defendant

ORDER

For the reasons set forth in the memorandum filed this date,

IT IS ORDERED that the motion of the plaintiff, Bill Harness, a/k/a Billie Lee Harness, for summary judgment be and it is hereby denied.

IT IS FURTHER ORDERED that the motion of the defendant, The Hartz Mountain Corporation, for summary judgment on the complaint of the plaintiff, Bill Harness, against it be and it is hereby granted and this action be and it is hereby dismissed with prejudice.

There is no just reason for delay, and this is a final and appealable order.

This 20th day of June, 1988.

/s/ Thomas A. Ballantine, Jr.
THOMAS A. BALLANTINE, JR.
United States District Judge

copies of counsel

ENTERED
JUN 20 1988

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 88-5791

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BILL HARNESS. *Plaintiff-Appellant,* v. HARTZ MOUNTAIN CORP., *Defendant-Appellee.*	))))))	ON APPEAL from the United States District Court for the Western District of Kentucky

Decided and Filed June 27, 1989

Before: KRUPANSKY and NELSON, Circuit Judges; BROWN, Senior Circuit Judge.

BROWN, Senior Circuit Judge, delivered the opinion of the court in which KRUPANSKY, Circuit Judge, joined. NELSON, Circuit Judge, (pp. 7-14) delivered a separate dissenting opinion.

BAILEY BROWN, Senior Circuit Judge. This reverse discrimination case involves an interpretation of Kentucky's statutory counterpart to the Pregnancy Discrimination Act, 42 U.S.C. § 2000(e) (k), and the Kentucky statute's application to the pregnancy leave policy of Hartz Mountain Corporation (Hartz). Harness contends that Hartz' policy discriminates in favor of pregnant employees and against male employees. We believe that

the Supreme court's opinion in *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), permits the favorable treatment accorded pregnant employees by the Hartz policy. Accordingly, we affirm the district court's grant of summary judgment in Hartz' favor.

FACTS

Bill Harness was employed by Household Research Institute (HRI) in July of 1972. In 1986, HRI was purchased by Hartz and on March 1, 1986, Harness became an employee of Hartz.

On June 6, 1986, Hartz was informed that Harness had suffered a heart attack and would require a leave of absence. Hartz placed Harness on unpaid leave on June 9, 1986, pursuant to the following policy applicable to non-union employees such as Harness:

> If your leave is for illness or non-work related injury, you are eligible for a thirty (30) day leave. If you are unable to return after the first 30-day leave, you may request an extension, in writing, with a doctor's note attached indicating your return to work date. If you are unable to return after 60-days (original leave plus 30-day extension), you may request another 30-day extension, in writing, with another doctor's note attached indicating your return to work date. If you cannot return after the aforementioned 90-days, you will be considered to have resigned your position because of illness.

Shortly after he was placed on unpaid leave, Harness was sent a copy of this policy by Hartz along with an acknowledgement form, which Harness signed on June 23, 1986, stating: "I have received your letter regarding

the Company's Leave of Absence procedures and agree to abide by them. I understand that failure to follow these procedures will result in my voluntary resignation."

Harness was granted the two 30-day extensions allowed in the policy. The maximum 90-day period of unpaid leave expired on September 9, 1986. Since Harness was unable to return to work at that time due to his continued illness, Hartz considered him to have resigned as of September 9, 1986.

The next month, Harness obtained a statement from his treating physician advising that Harness could return to work on October 14, 1986, 125 days from the day his unpaid leave began. Hartz abided by its policy and refused to reinstate Harness.

On August 6, 1987, Harness filed suit against Hartz in Jefferson Circuit Court alleging reverse discrimination in violation of KRS §§ 344.030(6) and 344.040(1). Harness contended that a provision in Hartz' leave policy accorded more favorable treatment to pregnant employees and thus discriminated against male employees. That policy provision states:

> If your leave is for maternity related reasons, you are entitled to a 90-day leave to be used before and after the date of delivery. This type of leave may be extended up to one (1) year, provided a written request is made each sixty (60) days.

At the request of Hartz, the suit was removed to federal district court on October 1, 1987, on the basis of diversity of citizenship. After stipulating to the facts, both parties moved for summary judgment. On June 20,

1988, the district court granted summary judgment in favor of Hartz. Harness now appeals to this court.

ANALYSIS

In 1980, Kentucky enacted its counterpart to Title VII's Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000(e) (k). The PDA is a definitional amendment to Title VII which was added in 1978 to "clarif[y] that the prohibitions against sex discrimination in the act include discrimination in employment based on pregnancy, childbirth, or related medical conditions." H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 1, *reprinted in* 1978 U.S. Code Cong. & Admin. News 4749, 4749. The Kentucky statute, KRS § 344.030(6), mirrors, word-for-word, the pertinent definitional language of the PDA. KRS § 344.030(6) provides:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in this section shall be interpreted to permit otherwise.

Harness contends that by virtue of the definition of sex discrimination in KRS § 344.030(6), he was discriminated against under KRS § 344.040(1) which provides:

> It is an unlawful practice for an employer:
>
> (1) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate

> against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, national origin, sex, or age between forty (40) and seventy (70) . . . .

The pregnancy leave policy of Hartz, Harness asserts, does not treat pregnant and non-pregnant employees the same and thus discriminates against male employees on the basis of sex, i.e., on the basis of pregnancy.

As there are no dispositive Kentucky court decisions interpreting KRS § 344.030(6) as it applied to KRS § 344.040(1), we must turn to the federal court decisions interpreting the PDA to decide this case. *Irvin v. Airco Carbide*, 837 F.2d 724, 726 n.1 (6th Cir. 1987) ("The cases construing Title VII are applicable in determining discrimination under the Kentucky Civil Rights statute, Ky.Rev.Stat. § 344.040 (1983)."); *Kentucky Comm'n on Human Rights v. Commonwealth*, 586 S.W.2d 270, 271 (Ky.Ct. App. 1979) ("The Kentucky statute [KRS § 344.040] is virtually identical to the corresponding section of the U.S. Civil Rights Act of 1964, codified in 42 U.S.C. § 2000e-2(a). Therefore, United States Supreme Court decisions regarding the federal provisions are most persuasive, if not controlling, in interpreting the Kentucky statute. *Kentucky Com'n v. Com., Dept. for Human Resources*, Ky. App., 564 S.W.2d 38 (1978).").[1] *See also* KRS

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[1] Not only is a decision by the Supreme Court of the United States interpreting the federal statute "most persuasive . . . in interpreting the Kentucky statute," it should also be noted that the decision in the district court in this case was made by Hon. Thomas A. Ballantine, Jr.. who was a state circuit judge for thirteen years before he became a federal district judge in 1979. We should give great weight to this district judge's determination of state law. C. Wright, Law of Federal Courts § 58 (1976).

§ 344.020(1) ("The general purposes of this chapter are: (a) To provide for execution within the state of the policies embodied in the Federal Civil Rights Act of 1964. . . ."); *Evans v. General Tire and Rubber Co.*, 662 S.W.2d 843 (KY. Ct. App. 1983); *Kentucky Comm'n on Human Rights v. Kerns Bakery, Inc.*, 644 S.W.2d 350 (Ky. Ct. App. 1982), *cert. denied*, 462 U.S. 1133 (1983).

The Supreme Court in *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), held that the PDA did not preempt a California statute which provided for up to four months of unpaid pregnancy disability leave and did not require similar leave for other disabled employees. The Court concluded that the PDA permitted some preferential treatment of pregnant employees. "Accordingly, subject to certain limitations, we agree with the Court of Appeals' conclusion that Congress intended the PDA to be 'a floor beneath which pregnancy disability benefits may not drop – not a ceiling above which they may not rise.' 758 F.2d, at 396." *Id.* at 285 (footnote omitted). After reviewing the legislative history of the PDA, the Court noted: "It is hardly conceivable that Congress would have extensively discussed only its intent not to require preferential treatment if in fact it had intended to prohibit such treatment." *Id.* at 287.

In the present case, the pregnancy leave policy of Hartz gives preferential treatment to pregnant employees. Such employees are permitted to take up to one year of unpaid leave for "maternity related reasons." Other employees, such as Harness, are allowed only 90 days of unpaid sick leave. Since the *Guerra* Court held, however, that such preferential treatment is permissible under the PDA, it follows that the preferential treatment

accorded pregnant employees under the Hartz policy is permissible under KRS §§ 344.030(6) and 344.040(1). *See Kentucky Comm'n on Human Rights*, 586 S.W.2d at 271. We conclude that the Hartz policy did not effect discriminatory treatment of Harness in violation of the applicable Kentucky statutes.

We therefore AFFIRM the district court's grant of summary judgment in favor of Hartz Mountain Corporation.

DAVID A. NELSON, Circuit Judge, dissenting. I should like to concur, but the unambiguous language of the Kentucky statute makes it difficult for me to do so.

Hartz Mountain's leave policy, as the court's opinion acknowledges, unquestionably discriminates in favor of pregnant employees. This is discrimination "because of sex," within the meaning of those words as used in the Kentucky statute, because the statute explicitly says so: "The terms 'because of sex' or 'on the basis of sex' include . . . because of or on the bases of pregnancy, childbirth, or related medical conditions. . . ." KRS § 344.030(6).

In a world governed by common sense, one might suppose employers would not only be free to discriminate in favor of women because of pregnancy, they would be encouraged to do so. Under KRS § 344.030(6), however, pregnant women must be treated "the same" as people who are not pregnant. Under KRS § 344.040(2), "[i]t is an unlawful practice for an employer . . . [to] classify his employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex" – and

"sex", in this context, includes pregnancy. Under KRS § 344.040(1), similarly, it is an unlawful practice for an employer "to discharge any individual or otherwise to discriminate against an individual" because of such individual's sex. Sex, again, includes pregnancy, because KRS § 344.030(6) says it does.

These provisions would seem, on their face, to tell employers "treat pregnant employees the same as anyone else. Do not classify your employees in any way which would adversely affect anyone's status as an employee on the basis of pregnancy, childbirth, or related medical conditions – i.e., on the basis of sex – and do not discharge anyone pursuant to such a classification."

The language of KRS § 344.030(6) seems plain enough: "[W]omen affected by pregnancy, childbirth, or related medical conditions *shall be treated the same* for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work, and *nothing in this section shall be interpreted to permit otherwise.*" (Emphasis supplied.) As Justice White said of the identical provision in the federal statute on which the Kentucky legislation was patterned, the provision "could not be clearer: it mandates that pregnant employees 'shall be treated the same for all employment-related purposes' as nonpregnant employees similarly situated with respect to their ability or inability to work. This language leaves no room for preferential treatment of pregnant workers." *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 297 (1987) (White, J., dissenting).

The plaintiff in the case at bar says that pregnant women are not treated "the same" at Hartz Mountain. He

says that they are treated differently from men, such as himself, who are similar in their inability to work. And he says that if he had been treated the same as a pregnant woman, he would not have been discharged three months after his leave began.

The plaintiff is, of course, correct. Pregnant women are not treated the same at Hartz Mountain, they are treated differently. Notwithstanding KRS §§ 344.030(6) and 344.040(2), Hartz Mountain unquestionably classifies its employees two different ways for medical leave purposes: employees taking leave because of pregnancy and childbirth come under one classification, and employees taking leave because of any other medical condition come under a second. Employees in the first classification can have their leave extended for up to one year, but employees in the second classification are automatically discharged if they cannot return to work after 90 days.

Such a classification would be unexceptionable if the criteria on which it is based – pregnancy and childbirth – had not been equated with "sex," a forbidden criterion. The statute would obviously allow an employer to adopt a classification system under which cancer patients, for example, could take leave for up to one year, while everyone else would be discharged for exceeding a 90-day limit. But the statute does not permit an employer to tell cancer patients that they may take leave for up to one year if they are women, and will be discharged after 90 days if they are men. That is discrimination on the basis of sex, and the statute prohibits it. Discrimination on the basis of pregnancy is sex-based discrimination too, the Kentucky legislature having said so in the plainest of terms, and the victim of such discrimination is no less

entitled to redress, as far as the language of the statute is concerned, than the victim of any other type of discrimination:

> "*Any* person deeming himself injured by *any* act in violation of the provisions of this chapter shall have a civil cause of action in circuit court to enjoin further violations, and to recover the actual damages sustained by him. . . ." KRS § 344.450 (emphasis supplied).

This provision contains no exception for acts of discrimination deemed by statute to be based on sex.

It is true that in *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, a majority of the Supreme Court, speaking of the federal counterpart of the Kentucky statute, expressed the view that if Congress had intended to prohibit preferential treatment for pregnant women, it would have said so in the legislative history. *Id.* at 287. Unable to find any manifestation of such an intent in the legislative history, and citing the "familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers," *id.* at 284 (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892), as quoted in *Steelworkers v. Weber*, 443 U.S. 193, 201 (1979)), the Court concluded that the federal statute was not intended to mean what it appears literally to say. Justice Stevens, concurring in *Guerra*, noted that although the plain language of the statute points to neutrality, there is no persuasive evidence "that Congress considered the ramifications of a rule mandating complete neutrality." *Id.* at 293 n. 2.

As to the case at bar, I am aware of no persuasive evidence that the Kentucky legislature considered the ramification of the "complete neutrality" rule embodied in the Kentucky statue. It is entirely possible – and perhaps it is probable – that if the legislature had considered the ramifications of what it was doing, it would have done something different. *Guerra* would seem to teach that judges need not follow the mandate expressed in the statute, under such circumstances, and may take the action they believe the legislature would have taken if the legislature had thought more carefully about what it was doing.

That sort of approach – a tempting one, as I can attest, *see Asphalt Products Co. v. Commissioner of Internal Revenue*, 482 U.S. 117 (1987) (per curiam) – does have its critics. In *The Nature of the Judicial Process*, Benjamin Cardozo, expressing himself with uncharacteristic bluntness, wrote that

> "Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment in despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. None the less, by that abuse of power, they violate the law." *Id.* at 129.

Chief Justice Burger, after quoting a later passage from the same chapter of Cardozo's book, put the point thus in his *Weber* dissent:

> "What Cardozo tells us is beware the 'good result,' achieved by judicially unauthorized or intellectually dishonest means on the appealing notion that the desirable ends justify the

> improper judicial means. For there is always the danger that the seeds of precedent sown by good men for the best of motives will yield a rich harvest of unprincipled acts of others also aiming at 'good ends,' " *Steelworkers v. Weber*, 443 U.S. at 219 (Burger, C.J., dissenting).

If judges can amend the text of a statute because it produces consequences probably not foreseen by its makers, will not much of the legislation now on the books be found subject to revision in the courts? And how, except through the actual words of the legislature, can any judge be sure that results which may strike the judicial mind as undesirable were not in fact foreseen by the persons who drafted the statute, if not by the legislators who voted for it?[1] And if judges could somehow know what was or was not in the mind of every legislator who voted for passage, how can it possible be known what the legislature would have done had its members been better informed? These are only a few of the questions raised by the *Guerra* approach, but perhaps they will suffice to suggest the *Guerra* is not without its problems. It is certainly not a foregone conclusion, in my view, that a state court in Kentucky would choose to follow the majority opinion in *Guerra*, rather than following the dissent, in a situation where *Guerra* does not constitute a legally binding precedent.

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[1] The problem is compounded here, of course, where the Kentucky statute was copied almost verbatim from the federal statute. If the federal statue had a narrower scope than its language indicates, how can we know that the Kentucky legislature was cognizant of that fact, the Supreme Court not having spoken to the point when Kentucky adopted the statute?

Guerra is not binding here as a matter of federal law, of course. The federal courts have jurisdiction over this case only because the parties are citizens of different states, and the law we are to apply in interpreting the Kentucky statute is the law of Kentucky, not the law of the United States. *Erie* R.R. *Co. v. Tompkins*, 304 U.S. 64 (1938).

I do not doubt that the Kentucky courts would treat *Guerra* as a most persuasive authority, in light of the fact that the Kentucky statute was copied from the federal statute. *Guerra* was not decided until well after the enactment of the Kentucky statute, however (the statute was passed in 1980 and *Guerra* was not decided until 1987), and in the such a circumstance I know of no Kentucky law requiring that the federal precedent be followed willy-nilly.

If the Kentucky courts were persuaded that the federal courts erred in *Guerra* – and judges from Kentucky are notoriously independent, as the first Mr. Justice Harlan demonstrated most conspicuously, perhaps, in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) – I assume that the Kentucky courts would not wish to make a similar error in applying the Kentucky statute. Among the general purposes of the Kentucky legislature, after all, was the purpose of safeguarding "all" individuals within the state from discrimination because of "sex," in the statutory sense. KRS § 344.020(1) (b). It was also the purpose of the Kentucky legislature to "provide for execution within the state of the policies embodied in the federal Civil Rights Act of 1964 as amended. . . ." As far as pregnancy is

concerned, the policies "embodied" in the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, can only have been the policies embodied in the statute Congress actually passed in 1978. Arguably, at least, those policies are not identical in all respects to the policies endorsed by a bare majority of the United States Supreme Court in 1987.

Kentucky courts try to give effect to the plain words of Kentucky statutes if the words are unambiguous, *Coomer v. Gray*, 750 S.W.2d 424, 425 (Ky. 1988), unless the plain meaning would "lead to an absurd or wholly unreasonable conclusion." *Bailey v. Reeves*, 662 S.W.2d 832, 834 (Ky. 1984). *Cf. Board of Education v. Logan Aluminum, Inc.*, 764 S.W.2d 75 (Ky. 1989). No one has seriously urged that the plain words of the statute before us in this case are ambiguous, so we are left with the question whether the results to which they point are "absurd" or "wholly unreasonable."

Thirty or forty years ago, perhaps, this might have been considered an easy question. I do not consider it so today. We have witnessed something of a social revolution in the past few decades, and while those of us who were not active participants may find it difficult to gauge the extent of the changes the revolution has wrought, we cannot simply ignore them. If I feel strongly that employers ought to be left free to extend preferential treatment to pregnant workers, that does not necessarily mean that Kentucky legislature failed to understand what it was doing when it said – as it did say – that a woman who cannot work because of pregnancy or childbirth

"shall be treated the same" as a person who cannot work because he or she is recuperating from a heart attack, for example.

It was urged on the *Guerra* Court with "conviction," according to Justice White, "that preferential treatment represents a resurgence of the 19th-century protective legislation which perpetuated sex-role stereotypes and which impeded women in their efforts to take their rightful place in the workplace." 479 U.S. at 300. Could a Kentucky judge who disagreed with that view hold, in good conscience, that it is "absurd" or "wholly unreasonable?" Probably not.

When in doubt, I believe, the better course is to take the legislature at its word and apply the statute was written. If the legislature finds that it has made a mistake, or that the voters do not like some of the ramifications of what the statute says, the statute can always be changed – by the legislature. Thus when Congress realized, as it did after the Supreme court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), that the earlier version of the Civil Rights Act of 1964 did not say what many Members would have preferred that it say, Congress responded by enacting the Pregnancy Discrimination Act of 1978. And if the Kentucky legislature should come to realize, as a result of a court decision, that a statute requiring pregnant women to be treated "the same" goes further than the legislators, on reflection, consider wise, I do not doubt that the legislature would change the statute. Kentucky legislators get paid for that sort of thing. Kentucky judges do not.

This is difficult case, but I an inclined to believe that a Kentucky judge who thought the matter through carefully, without losing sight of the courts' assigned role, would decide that the Kentucky statute must be applied as written. My colleagues having seen the matter differently, I respectfully dissent.

No. 88-5791

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BILL HARNESS, a/k/a BILLIE LEE HARNESS, Plaintiff-Appellant,	)	ORDER
v.	)	FILED
THE HARTZ MOUNTAIN CORPORATION, Defendant-Appellee	)	August 10, 1989

BEFORE: KRUPANSKY and NELSON, Circuit Judges; and BROWN, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Nelson adheres to his dissent.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green,
Leonard Green, Clerk